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ABSTRACT

The views of the Chairman of the U.S. Senate Commerce Committee on freedom of electronic information are contained in this speech transcript. The speech opens with a warning that government regulation of the electronic media is expanding and extending in a dangerous way, posing the possibility that one day this regulation will be extended to the print media. Next, it recounts several recent Federal Communication Commission decisions and court cases that indicate a movement in this direction. Citing historical precedent, the speech then points out that if the Supreme Court eventually upholds the right of regulation over the rights of the electronic media, it would be almost impossible to overturn the decision. It then recommends that while maintaining the sanctity of the First Amendment, broadcasters should work toward the passage of a new constitutional amendment guaranteeing their rights. The next part of the speech contains the chairman's promise to work for the passage of such an amendment if he could be assured of the broadcasters' support. Questions from his listeners, newspaper publishers, and the chairman's answers, which reiterate his belief in the need for an amendment and explain how he would go about introducing and working for it, make up the final section of the speech. (JL)

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[Views on Freedom of Electronic Information]

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Senator Bob Packwood

"... and soon if you cannot
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pen: either we back off the
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tion of print.

I do not know how we can
come to any other conclu-
sions, can we?"

Professor Thomas Krattenmaker,
Georgetown University Law Center

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"... technology is blurring the traditional definitions of communications media as well as the uses to which these media have been put. The press, radio, television, telephony, and various other forms of communication are now still quite distinguishable, but advances in technology will render these media much, much less distinct to the end user, the consumer, you and I in our homes and businesses in the future."

Dr. Solomon J. Buchsbaum,
Executive Vice President,
Bell Laboratories

On September 13, 1982, Times Mirror hosted a dinner in Washington, D.C. for a group of distinguished American newspaper publishers. Senator Bob Packwood, Chairman of the U.S. Senate Commerce Committee, discussed his views on freedom of electronic information. The issues raised by Senator Packwood and his interlocutors are of fundamental importance to the American public as well as to members of the publishing and broadcasting communities. Following is the text of Senator Packwood's remarks and the subsequent questions and answers.

Tonight I am going to try some ideas out on you that result from my recent experience with communications issues since becoming Chairman of the Senate Commerce Committee last year and my long-standing concern for civil liberties.

I must admit that I knew little about communications law, even though I had been on the Committee for five years. When we got into serious debate on S. 898, the telephone deregulation bill, a year and a half ago, not all of the debate was on whether or not AT&T could put the yellow pages on television, although that was part of it. That bill contained comprehensive amendments to the Communications Act of 1934. In the hearings on S. 898, a great portion of the witnesses' testimony was on the technology of communications. I found it fascinating. If five years ago, someone had told us that soon we could put a funny-looking dish on our roofs, one we could probably buy at Radio Shack for between \$200-\$400, and connect it ourselves, and use it to pick up television signals broadcast by a communications satellite, we would have thought that person was talking about Buck Rogers or Flash Gordon. As hard as it is to believe, let me assure you, that day is here.

And one prediction I would make is that none of us knows what communications technology will be like five or ten years from now. We don't know what form it is going to take. It is an explosive science. A revolution is taking place that none of us foresaw; certainly not in the Congress of the United States.

So I began to think about the direction we are moving in. When our founders passed the First Amendment, the only known methods of communication were speech and print.

At that time, there were eight daily newspapers — four in Pennsylvania, three in New York, and one in South Carolina. That is scarcity — real scarcity. Yet, in an era when communications outlets were scarce, our founders were so concerned about protecting freedom of expression that they simply barred any government intervention in the right to communicate.

Where are we today? Even if you count each cable company as only one outlet — if you ignore how many channels they may provide in a local area — we are now approaching 15,000-20,000 outlets in this country and they are multiplying faster than we can keep track of them.

The argument of scarcity in electronic communications is gone. People may still argue, "Well, not everyone can get a radio or TV license, but anyone can print a newspaper." Some people say, "Anybody can get a mimeograph. Crank it up and that's a newspaper." But that's different. That's comparing apples and oranges. The mimeograph equivalent in electronics is the CB radio. Anyone can own a CB radio. It costs roughly the same to operate a mimeograph as to operate a CB radio. Neither is expensive and neither is mass communications.

For another example, ask yourself, "What would it cost me to buy a radio station in Washington?" and compare what it would cost to buy the *Washington Post* or start the *Washington Times*. The answer is that print is more scarce than electronics in terms of how much it costs to get into the business, or to buy a going business.

Although scarcity is no longer a problem, the Federal Communications Commission and the Supreme Court have, for better or for worse, continued to regulate the electronic media on the scarcity rationale. Now they are expanding and extending it in a dangerous way. The extension of regulation to cable is a marvelous example of this threat.

We have created some not-so-easily drawn distinctions among communications services. If you were "print," the presses rolled, and off came a paper. That clearly was "print" and the government could not possibly regulate that activity. If you went up into space, like radio did, that triggered the Federal Radio Act. The airwaves were a "scarce commodity," and you could not avoid regulating them because they were owned by the public and you had to use them for the public good.

There's an analogous argument in the West about the national forests. The public owns them. We decide who gets to cut them and what they cut — and the same argument is made with the airwaves. The government decides who gets to use them, how long they get to use them, and what can be said on them.

Then there was an "in-between" situation in which the government classified wire communication — the telephone and the telegraph. The government never really thought they could regulate the content of what the wires carried, although they certainly could regulate who had access to the wire. This was done by describing it as a common carrier; that doesn't quite fit into either broadcasting over the air or rolling the printing press.

But along came cable, which delivers services through a wire. If cable is to be fit it to this classification scheme, it ought to fit into the common carrier definition. It doesn't

belong in the "over the air" or broadcast categories. Even though cable is literally a wire, the FCC decided, with the approval of the Supreme Court, that cable is subject to the same "equal time" and "fairness" rules that apply to sending messages through the air.

I strongly disagree with that result. But the Federal government and the courts have said that is the law.

There may come a time in this country, with perhaps the wrong President, the wrong Congress, or the wrong FCC, when these laws will be used to regulate the press. The Federal government could regulate all expression sent by electronic means. You may still roll your newspapers off presses, but many of the messages that you send to the public will be electronically delivered. Of course, for years, AP and UPI have used electronic means to deliver their services. But what happens if you have presses in Fargo or Minot, and you send information by wire or satellite and the government asserts control over that information on the way to your presses? Not many messages are sent by courier anymore!

You may ask, "Why do I think we are coming to that point?" Well, there is an intriguing series of cases that must be considered. One of the most frightening is little known. That is the *Pacifica* case, or the "Seven Dirty Words" case.

The *Pacifica* Foundation's New York City radio station played a George Carlin monologue which had been recorded in a nightclub. In this twelve-minute cut, there are "seven dirty words" and a fellow heard them as he drove his car down the road with his teenage son as his passenger. The man was offended and called the radio station to complain. Then he called the FCC. The upshot of it was that the FCC agreed, and put a black mark in the station's

file. The FCC didn't lift the station's license, but the black mark meant that when the license comes up for renewal, the complaint is going to count against the station getting that renewal. The case was appealed to the Supreme Court which agreed with the FCC. The decision was grounded not on the basis that the language was obscene or pornographic, but that it was *indecent*. Many things could be described by a government as "indecent."

Another intriguing case with great implications is the Carter-Mondale Committee suit against three networks — CBS, ABC, and NBC. The most interesting issue in the Carter-Mondale case was one the networks never raised with the Supreme Court; therefore, of course, the court did not decide it. Although the networks, as networks, are not licensed by the government, the FCC directed them to give the Carter-Mondale Committee broadcast time for its political advertisements. The government does not have the power to tell the networks to take any other particular type of advertising. As I said, their lawyers did not raise the issue with the Supreme Court. I think the networks were afraid to raise it because the networks also own and operate TV stations in the biggest markets in this country and they do not want to jeopardize those licenses.

And, of course, the classic cases are *Red Lion* and *Miami Herald*. *Red Lion*, a small broadcasting company in Pennsylvania, sold some time to evangelist Billy James Hargis. In the course of his fifteen-minute broadcast, Hargis railed against a man named Cook, who had written a book attacking Senator Barry Goldwater.

Cook demanded free reply time. The FCC agreed, and the case went up to the Supreme Court, which said, "you have to give him time." It didn't matter whether or not

he could buy time. It didn't matter that Hargis paid for his time. The station had to give Cook time for a reply. This decision comes very close to the government telling the station what it can say because it was very clear that Mr. Cook was not going to agree with Mr. Hargis. But the Supreme Court, in 1969, found that radio used a scarce resource, and it, therefore, must be used for the public good.

A more recent case involved the *Miami Herald*. Florida had the state equivalent of an "equal time" statute. If a newspaper attacked somebody, the newspaper had to give that person equal space in which to respond. This old law had never been tested in court. The *Miami Herald* attacked a political candidate named Tornillo. He demanded space to reply, but the *Herald* refused to give it to him. That decision was taken to the Florida Supreme Court which upheld Tornillo's request saying that the *Miami Herald* had to give him space. The Florida court cited as precedent the *Red Lion* case, because newspapers were so entwined with electronic journalism and the transmission of messages by electronic means that they should be governed by broadcast-type laws. Even though the decision was reversed on appeal in the U.S. Supreme Court, newspapers and others concerned with freedom of expression should remember that Florida decision. The implications of the Florida holding are frightening.

As I mentioned, the U.S. Supreme Court reversed, citing the First Amendment. The odd thing is that they never even mentioned *Red Lion*. Tornillo's lawyer had made a good argument about electronics and how information is electronically transmitted from press to press, but the Court simply never addressed that argument. To this day, academic specialists do not understand why the Court

ignored *Red Lion*. They believe that the Court could not reconcile *Red Lion* with the First Amendment and it simply ignored the implications of that prior decision in coming down on the side of the *Miami Herald*. Future courts may not have the same view of the First Amendment rights of the printed press.

Another recent example is the case of Simon Geller. Simon Geller operated a radio station for eighteen years. It was a one-man, daylight station that broadcast classical music all day, with never a complaint from the local area. Geller's license came up for renewal and in came a challenger. The challenger promised to broadcast some news and public affairs programs. The FCC took Mr. Geller's license away at renewal time on the argument that he was not serving the public interest; that, indeed, Gloucester is entitled to have something other than classical music on that station.

Now, FCC records indicate that Gloucester gets over forty other stations. The residents are not hard pressed if they don't like classical music. They can get the news and the ball scores and the New England Patriots game. They are not denied anything. That was an arbitrary decision. It is on appeal, but I feel bad for Mr. Geller, who I believe was providing a unique service for the residents of Gloucester.

Interestingly, liberal academics are on my side on this issue. Many of the younger ones are frightened to death. They understand that there is no spectrum scarcity, and are afraid of how the Court handles these cases. Instead of the Court saying, "We are going to reverse ourselves and, henceforth, all expression will be governed by the First Amendment"; the academics fear the Court could just as easily go the other way and say, "Henceforth, all

communications are electronic, and thus are subject to government regulation."

That is the background of my interest and concern. Your interest in this issue, I hope, is clear. All of you, in one way or another, are already transmitting information electronically. Some of you own television stations and some of you certainly own cable.

You are going to run some risks if you do nothing. One is whether the Supreme Court will come down on your side or on the side of government regulation. If the Supreme Court comes down on the regulation side, then all you are going to have left is the right to roll your presses and print. The Federal government will have established the right to control the content of any electronic information you seek to transmit.

Once the Supreme Court acts — if that's the way it comes down — the next risk you run is in trying to overturn the Supreme Court decision. By then, it would take a Constitutional amendment, which would be well nigh impossible to pass. Amendments designed to reverse the consequences of Supreme Court decisions have succeeded only four times in the history of our country.

The first was in 1795, after a citizen of South Carolina had sued the State of Georgia. A citizen of one state sued another state — not a citizen of another state, but the state itself. A Constitutional amendment was quickly passed to prevent a citizen of one state from suing another state.

It happened again with the Civil War amendments, when we overturned the Dred Scott decision which said that blacks weren't citizens.

It happened with the 16th Amendment, after the Supreme Court had said that you cannot tax income.

Then it happened just a few years ago on the 18-year-

old vote. Congress passed a law saying that 18-year-olds could not vote in Federal and state elections. The Supreme Court said Congress had the power to do that for Federal elections but not for state elections. An amendment was passed that clarified the voting rights of 18-year-olds.

Those four times are the only instances in our two-hundred-year history when we have successfully overturned Supreme Court interpretations of the Constitution.

If the Court hands down a Constitutional interpretation and allows the Federal government to control electronic communications, then you take the gamble that, for only the fifth time in two hundred years, you can successfully overturn that decision.

I believe there is another approach. But, at the outset, I want to make it very clear that *I do not suggest that we alter or amend the First Amendment.*

I am suggesting a new amendment. I have not drafted it and I have no intention of drafting it without laying the proper foundation. Otherwise, as soon as I announce a draft, people will take potshots at it. The American Bar Association will say, "This isn't a proper amendment," and the American Newspaper Publishers Association will say, "This is what's wrong with it."

By that time, there would be built-in opposition which would take twenty years to convert. When I advance the amendment, if I do, I want to advance it with your support, and the support of the broadcasters, the American Library Association, and a broad base of other people interested in the delivery of information. I am prepared to spend two or three years before I have any of them behind me.

Furthermore, an amendment will not be advanced

without your support — period. If it is not of concern to you, I will not pursue it.

The whole process may take five to ten years. Frankly, I believe it will be an easier battle than trying to repeal the Fairness Doctrine and the "equal time" provision. I support that repeal — we've got to get rid of the Fairness Doctrine and "equal time." But what will happen if you put that proposition to the public: "I want to repeal fairness!" How many people are going to want to repeal fairness?

"How many people here are in favor of freedom of speech and freedom of the press and freedom of expression?" I will put that proposition to any crowd and that one will win. Frankly, the decision is up to you, and I will never speak to a more significant group — if I am at this ten years — than the group here tonight.

If you aren't behind it, if you don't believe, and don't grasp the danger to all of our liberties — not just yours, but all of ours — then the day will come when the Supreme Court may limit all of your liberties, and therefore, all of our liberties. If I am still around to fight this in ten, fifteen or twenty years, I'll join the resulting battle. But it will be much easier to start now on a five-to-ten year crusade, gradually building momentum to amend the Constitution, than trying to fight uphill to change a Supreme Court decision that may have permanently restricted our rights of free expression. Very honestly, the decision is in your hands, not mine.



— I must tell you I was one who didn't agree with stretching the First Amendment. But I enjoyed listening to what you just said. Can you tell us what direction you think you might take with your proposal?

PACKWOOD: I don't know exactly what direction I will take, but I believe a Constitutional amendment is necessary. Any statute can be repealed. I don't care if the statute repeals the Fairness Doctrine and repeals "equal time" and says that electronic journalism is entitled to the same First Amendment privileges as print. That statute can still be repealed.

I have talked with half a dozen academics who agree with me and I have asked them how to draft this amendment. None of them is sure how it should be drafted because nobody has really ever posed the question to them.

How often have law professors who specialize in Constitutional law been asked to draft a Constitutional amendment guaranteeing freedom of expression?

It is going to be two to three years before we have an amendment drafted, and five to ten years before we pass it. That assumes that the print media will come forward with strong support. Most of you are already on the side of repealing the Fairness Doctrine and "equal time." This is really not an uphill battle with you.

Assuming that I get a resolution and endorsements out of newspapers around the country, I will try to put together an *ad hoc* committee. About a year or a year and a half from now I would call the first meeting — thirty or forty people.

Half of those people would be the best academics in this country and the other half would be print and broadcast journalists who say, "All right, we want to protect freedom of expression — how do we go about it?" And I would invite everyone of consequence, or their associations, to be participants in that meeting.

► Senator, is there any way that this could be accomplished, short of a Constitutional amendment? Because when you get into that debate, obviously the positions of the newspaper industry and the broadcasters are going to enter into it. It seems to me that is going to be extremely difficult, and I wonder if there is not a way to do it through the legislature or through the courts?

PACKWOOD: Well, we now have Section 326 of the Federal Communications Act. That says the FCC can't censor radio communications. It hasn't done much good, but even that could be repealed. As electronic communication becomes more and more pervasive, you must understand that the present tilt of government is toward the regulation of electronic journalism, not away from it. As newspapers become more and more electronic, you are going to come up against one of two things. Either you are going to come under the cloud of the regulation of electronic journalism, or there is going to be a change in the Supreme Court's reasoning and they are going to say that ever since the Federal Radio Act was passed their decisions have been based on the realities of the times in which they were considering the particular issues. Technically, they won't have to reverse their old decisions, because they were relevant to the times. Since the times have now changed, they can alter the direction of their

decisions. The Court might do that, or the Congress may pass a legislative solution, but any act of Congress is subject to repeal by the next act of Congress.

It's interesting to note that all of the civil liberties we have in our Constitution are protected only by statutes in Britain; all, that is, but the First Amendment — Britain never had a First Amendment. Today, they don't have what we have in terms of freedom of speech and freedom of the press. But all of our other liberties contained in the Bill of Rights, such as search and seizure, self incrimination . . . all of those are statutory in England. They are all parliamentary acts, and our founders, for wise reasons, made them constitutional.

Now we can opt to go with statutory reforms but then you better pray that you always have a Congress who agrees with you and pray that you won't get swept off your feet.

► The question I have is addressed to tactical considerations. Would it make sense to try legislation as a first step, with the idea that down the road, the next ten years anyway, you would amend the Constitution? Or does legislation tend to pull the process apart?

PACKWOOD: I've seen this before. Let's assume that the issue, as far as Congress is concerned, is freedom of the press. When a bill has passed Congress, the Members do not want to come back in three years, and have to move on it again.

Abolition of the Fairness Doctrine and "equal time" will be an uphill battle. I think we can win with a Constitutional amendment so long as you all understand that without this group here tonight, if this group doesn't care,

I can't go forward with it. But this is an easier battle to win than the repeal of the Fairness Doctrine and "equal time."

— Senator, what do you think the feeling is on the Hill about this kind of issue? Will others support it?

PACKWOOD: There is no particular feeling on this issue. I'm not going to go to a single Senator until I've got a Constitutional amendment that I know is carefully drafted. If you go to a hundred Senators, only five to ten may really know what "equal time" is or the Fairness Doctrine, let alone the *Red Lion* and *Pacifica* cases. They simply are not yet familiar with these issues.

I am not going to go to them until I have got publishers, the broadcasters, and the Library Association, and the journalism teachers and a lot of other associations I haven't even checked yet.

And, if the support isn't there, I am not going to the Senators, because this issue, at its zenith, is not going to be a public issue. This is an intellectual argument that must be bolstered by intellectual editorials and academic lobbying. At its zenith, this will not be in the top twenty of anybody's list. This is not an issue like prayer or abortion or busing. This issue, unfortunately, is never going to generate much interest, except among the scholarly groups in this country, or those that are specifically affected. But if we start out right, we will win this issue.

— Senator, when you talk about a Constitutional amendment, are you talking about amending the one that keeps us alive, or are you talking about adding on a new one?

PACKWOOD: I am talking about adding a new one. I have never had any intention of revising the First Amendment. As far as I am concerned this would be a separate amendment, the 27th Amendment. Here is where a very small group can be significant and that group is the country's Constitutional law professors. We are now talking about a couple of hundred people and if you talk about the best, we are now talking about twenty people. Most of them are on our side, and when they come in and testify and say, "This in no way touches the First Amendment. This is an expansion. This is a different amendment," that is critical.

— Why don't you have more faith in the Supreme Court?

PACKWOOD: Well, various Presidents appoint its members, but the real problem is trying to overturn embedded precedents.

I would rather have the Court's decisions on my side and defend against their reversal than have the Court against me and try to reverse them. If they come down against you, then about all you can say is, "Well, they were appointed by Ford or by Reagan or whomever." That doesn't matter. In the average citizen's mind, if the Supreme Court has said that the government can regulate print, that's it. Now try to reverse that.

I would rather push to change a situation where the Court has *not* decided than one where it has decided against me.

— Senator, what intellectual groups do you envision that might be against such a thing?

PACKWOOD: I don't expect any, but it is interesting to note that on this issue, the far left and the far right are akin.

The far left would like to own you — the press — if they had the choice. We could have the government run you as it does in many of the countries of the world.

The far right, while they might not want to own you, certainly want to censor you to make sure that you can't say anything that is inimical to the morals of this country.

— I'm still uneasy about your scenario for the next ten years. Things may not get any worse than they are now, you think. We will have a better chance of passing an amendment if there is no legislation in the next ten years. Is that what you meant? Why wouldn't legislation provide some momentum to help an amendment pass?

PACKWOOD: We already touched on that attitude of Congress. They would say, "We have done that; we've taken care of that."

Assume you have finished a tough battle. Let's say the battle was the repeal of the "Fairness Doctrine" and "equal time" and maybe a cable bill. It would be an uphill battle. So you go to your Member of Congress and your Senator and you say, "Now come on, Nancy, come on Jim. Come with us on this issue, even though it's very unpopular." This repeal of fairness will be unpopular. But you drag them with you and you finally succeed. They have passed it, and then you come back two years later and say, "Now, we are going to go to a constitutional amendment." They'll say, "Buzz off."

I want to emphasize that I didn't say do nothing for ten years. I said it will take us five years to ten years to do

this. The bulk of the time will be spent in preparation. If I had my druthers, every newspaper would editorialize in favor of what we are going to do, and very gradually, when candidates come in to the editorial board meeting, you might say, "What do you think about the Freedom of Expression amendment?"

I want everybody on board before I start and I have no intention of moving precipitously.

I am not going to go ahead unless I am 90 percent sure it can be won and it will not be wasted time. And when we go, we will win.

A Supreme Court decision, identical to the Florida Supreme Court decision in the *Miami Herald* case, is all it would take to totally change the rules of the game.

That Supreme Court decision would simply say, "Henceforth, newspapers are electronic, subject to all of the same regulations which other electronic communications must obey."

